Office-Supreme Court, U.S.
FILED
AUG 30 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1893

IN THE

Supreme Court Of The United States

October Term, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellant

v.

MARTIN INDUSTRIES, INC.,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION TO DISMISS

JAMES P. ALEXANDER
James Walker May
Eldridge D. Lacy
Bradley, Arant, Rose & White
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

Attorneys for Appellee
Martin Industries, Inc.

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

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16 pp

QUESTION PRESENTED

Whether the Court has jurisdiction under 28 U.S.C. 1252 over this appeal which merely seeks review of the relief ordered by the district court and not of the district court's holding that the one-House legislative veto provision of the Reorganization Act of 1977 (5 U.S.C. 906) is unconstitutional, and which the Appellant concedes that the Court is without jurisdiction to review.

MARTIN INDUSTRIES, INC.'S PARENT, AFFILIATES AND SUBSIDIARIES

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Martin Industries, Inc., avers that it has no parent companies, affiliates or subsidiaries, except for its wholly owned subsidiaries.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellant

v.

MARTIN INDUSTRIES, INC.,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION OF APPELLEE MARTIN INDUSTRIES, INC. TO DISMISS

The Appellee, Martin Industries, Inc., respectfully moves to dismiss this direct appeal from the district court on the ground that the Court lacks jurisdiction. Martin Industries adopts the Statement of the Facts and the Statement of the Statutory and Reorganization Plan Provisions involved found in Appellant EEOC's Jurisdictional Statement at pages 1-2.

MOTION TO DISMISS

Appellee, Martin Industries, Inc., hereby moves to dismiss the appeal on the ground that this Court does not have

jurisdiction over the appeal under 28 U.S.C. 1252. The Court lacks jurisdiction under 28 U.S.C. 1252 as the appeal merely seeks review of the relief ordered by the district court, the granting of Martin's motion for summary judgment, and not of the district court's holding that the one-House legislative veto provision of the Reorganization Act of 1977, 5 U.S.C. 901 et seq., is unconstitutional. Indeed, in its Jurisdictional Statement in this appeal, the Appellant stated

> This Court does not have jurisdiction over the direct appeal because the Commission does not seek review of the district court's holding that the legislative veto provision of the Reorganization Act is unconstitutional, but instead seeks review of other issues. Those other issues are: whether the legislative veto provision is severable from the remainder of the Reorganization Act; whether Congress intended when it passed the Reorganization Act in 1977 that reorganization plans that were not vetoed by one house of Congress should be invalidated if the legislative veto authority in the Act subsequently was held unconstitutional; whether this Court's decision in Chadha should be applied retroactively to invalidate completed reorganization plans; and whether Congress in any event has ratified the transfer of the enforcement authority to the Commission.

Jurisdictional Statement of EEOC in *EEOC v. Martin Industries,* p. 5.[1] Thus, as Appellant asserts, not only does this appeal fail to seek review of the district court's holding on the constitutionality of legislative one-House veto provision of the Reorganization Act of 1977, but even if the Appellant sought review of the district court's holding on

[1]The Appellant's Jurisdictional Statement in *EEOC v. Allstate,* No. 83-1021, appeal dismissed (June 11, 1984), likewise did not "seek review of the holding that an Act of Congress is unconstitutional and instead challenge[d] only the relief granted by the district court." Jurisdictional Statement of EEOC in *EEOC v. Allstate,* p. 6.

this issue, due to alternative holdings avoiding the constitutional question, *i.e.*, severability, ratification, etc., resolution of this issue would not be appropriate.

The Appellant has likewise indicated in its Jurisdictional Statement that this appeal was taken for protective purposes only, stating

> This appeal was docketed for protective purposes only pending the court's disposition of the Commission's direct appeal on *EEOC v. Allstate Insurance Co.*, No. 83-1021, which presents identical questions concerning the court's jurisdiction under 28 U.S.C. 1252 and the Commission's authority to enforce the Equal Pay Act.

Id. at p. 4. As the Solicitor General concedes, this case is identical to *EEOC v. Allstate Insurance Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983); and was docketed for protective purposes only pending the court's disposition in *Allstate*. Subsequently, however, on June 11, 1984, *Allstate* was dismissed without opinion by the court for want of jurisdiction. Thus, the grounds for the Solicitor General's appeal no longer exist. Moreover, the Court's summary affirmances and dismissals are "on the merits, entitled to precedential weight." *Anderson v. Celebreeze*, ... U.S. ....., 103 Sup. Ct. ....., 75 L. Ed. 2d 547 (1983); *Meek v. Pittenger*, 421 U.S. 349, 367 n. 16 (1975); *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974); *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974); Stern and Gressman, Supreme Court Practice 327-28 (5th ed. 1978). Thus, dismissal for lack of jurisdiction is dictated by the Court's recent decision in *Allstate*. Indeed, Martin is at a loss as to why the Court has called for a response to Appellant's Jurisdictional Statement in this case.

Even if the Court were inclined to take jurisdiction, unlike other suits involving the issue of the EEOC's enforce-

ment authority under the Equal Pay Act of 1963, 29 U.S.C. 206 (d), and the Age Discrimination in Employment Act, 29 U.S.C. 621 et seq.,[2] Martin's sole interest is entry of its proposed consent decree with the EEOC.[3]

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[2]To date *EEOC v. Allstate, supra*, and *EEOC v. Westinghouse*, _____ F. Supp. _____, 33 FEP Cases 1232 (W.D. Pa. 1984), represent the only decisions rejecting the EEOC's authority to enforce the Age Discrimination in Employment Act and Equal Pay Act. The following courts have held that the EEOC lacks enforcement authority under the Equal Pay Act and Age Discrimination in Employment Act: *EEOC v. Hernando Bank, Inc.*, 724 F. 2d 1188 (CA 5 1984); *EEOC v. Dayton P&L Co.*, _____ F. Supp. _____, 35 FEP Cases 401 (S.D. Ohio 1984); *EEOC v. Pan American World Airways, Inc.*, _____ F. Supp. _____, 34 FEP Cases 321 (N.D. Calif. 1984); *EEOC v. CBS, Inc.*, _____ F. Supp. _____, 34 FEP Cases 257 (S.D. N.Y. 1984), *interlocutory appeal pending* No. 84-6063 (CA 2, docketed February 28, 1984); *EEOC v. Old Dominion Freight Lines, Inc.*, _____ F. Supp. _____, 34 FEP Cases 377 (M.D. N.C. 1984); *EEOC v. Radio Montgomery, Inc.*, _____ F. Supp. _____, 34 FEP Cases 378 (W.D. Va. 1984); *EEOC v. State of New York*, _____ F. Supp. _____, 34 FEP Cases 379 (N.D. N.Y. 1984); *EEOC v. Plessey, Inc.*, _____ F. Supp. _____, 34 FEP Cases 500 (D. Kansas 1984); *EEOC v. International Mill Service, Inc.*, _____ F. Supp. _____, 34 FEP Cases 392 (E.D. Pa. 1984); *EEOC v. Ingersoll Johnson Steel Co.*, 583 F. Supp. 983 (S.D. Ind. 1984); *EEOC v. U.S. Steel Corp.*, _____ F. Supp. _____, 34 FEP Cases 1091 (W.D. Pa. 1984); *EEOC v. Chrysler Corp.*, _____ F. Supp. _____, 34 FEP Cases 1862 (N.D. Ga. 1984); *Muller Optical Co. v. EEOC*, 574 F. Supp. 946 (W.D. Tenn. 1983), *appeal pending*, No. 83-5889 (CA 6, docketed November 29, 1983); *EEOC v. Jackson County*, _____ F. Supp. _____, 33 FEP Cases 963 (W.D. Mo. 1983); *EEOC v. City of Memphis*, 581 F. Supp. 179 (W.D. Tenn. 1983); *EEOC v. Cudahy Foods Co.*, _____ F. Supp. _____, 33 FEP Cases 1836 (W.D. Wash. 1983); *EEOC v. El Paso Natural Gas Co.*, _____ F. Supp. _____, 33 FEP Cases 1837 (W.D. Texas 1984).

[3]Martin's primary goal continues to be reduction of litigation expense in the appellate process in a case it believed it had settled. Martin is a reluctant participant in these appeals. Thus, Martin is not pursuing the issues addressed in its Motion for Summary Judgement and Brief in support thereof. Indeed, in its brief to the Eleventh Circuit, Appellee Martin did not address these issues and instead addressed solely the propriety of the district court's refusal to enter the consent decree proposed by the parties.

CONCLUSION

For the reasons stated herein this appeal should be dismissed as the Commission's appeal properly lies under 29 U.S.C. 1291 in the Eleventh Circuit Court of Appeals which has already taken jurisdiction.[4]

Respectfully submitted,

JAMES P. ALEXANDER
James Walker May
Eldridge D. Lacy
1400 Park Place Tower
Birmingham, Al. 35203
(205) 252-4500

Attorneys for Appellee, Martin Industries, Inc.

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

[4]Attached hereto as Appendix A is a copy of the Eleventh Circuit's order taking jurisdiction.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7194

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

versus

MARTIN INDUSTRIES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

[May 21, 1984]

Before HATCHETT, ANDERSON, and CLARK, Circuit Judges.

BY THE COURT:

The court has taken under consideration whether it has jurisdiction of this case. Based upon the record before us, we tentatively conclude that we do have jurisdiction. However, upon full briefing by the parties and presentation of the merits issue and jurisdictional issue to an oral argument panel of this court, that panel may well determine that jurisdiction is properly in the Supreme Court of the United States. Thus, our tentative ruling does not become the law of the case.